

CORRUGATED CARTON PRODUCTS SDN BHD

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v.

KONG LONG HUAT REALTY SDN BHD

COURT APPEAL, KUALA LUMPUR

b

MOHD SAARI YUSOFF JCA

MOHD NOOR AHMAD JCA

ARIFIN ZAKARIA JCA

[CIVIL APPEAL NO: W-02-82-1999]

28 JUNE 2003

c

CONTRACT: *Sale and purchase of land - Sale and purchase agreement - Extension of time - Clause providing for extension of time for purchaser to complete purchase - Whether extension of time takes effect automatically - Whether purchaser must notify vendor of desire to have extension of time - Rationale - Payment of interest on outstanding balance of purchase price - Whether vendor's offer to refund deposit subject to purchaser treating agreement as null and void*

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The plaintiff had earlier entered into an agreement with the defendant on 11 October 1989 for the purchase of a piece of land from the latter at the price of RM550,000. Pursuant to this agreement, the plaintiff paid a deposit of RM50,000 to the defendant. Thereafter, on 10 January 1990, the defendant gave the plaintiff notice of its intention to terminate the agreement and proposed to refund the deposit paid upon the agreement being treated as null and void. It was contended that the plaintiff had failed to complete the purchase of the land within the three-month period provided for under the agreement. The plaintiff rejected this 'unilateral termination' of the agreement and brought a claim for specific performance. The instant appeal was from the decision of the High Court dismissing the plaintiff's claim and allowing the defendant's counterclaim. The principal issue before the Court of Appeal was whether the termination of the agreement by the defendant was, in the circumstances of the case, valid and effective.

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Held:

Per Arifin Zakaria JCA

[1a] Clause 3(a) of the agreement clearly provided that the sale and purchase of the land had to be completed within 90 days from the date of the agreement, *ie*, on or before 9 January 1990. The defendant was, therefore,

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- a* acting well within the terms of the agreement when it terminated the same upon the plaintiff's failure to complete the purchase of the land by 9 January 1990. (p 547 e-f)
- b* [1b] Although cl. 3(a) of the agreement also provided that "the vendor shall grant to the purchaser an extension of a further thirty days in respect of the completion date but upon payment of interest on the outstanding balance of the purchase price", this **did not automatically** confer the plaintiff with a 30-day extension of time upon the expiry of the initial 90-day time-limit. The plaintiff would have to **notify** the defendant of its desire to have the said 30-day extension of time. Notification was an implied precondition for the full operation of cl. 3(a) of the agreement. (p 550 b-h)
- c*
- d* [2] The defendant's offer to refund the RM50,000 deposit paid by the plaintiff was subject to the parties reaching an amicable settlement and the plaintiff agreeing to treat the agreement as null and void. Since the plaintiff had refused to treat the agreement as null and void, and had commenced the present action for specific performance, the defendant's offer no longer stood. In the circumstances, the defendant was entitled to forfeit the said deposit. (p 551 b-g)
- e* [Plaintiff's appeal dismissed; termination of agreement valid; defendant entitled to forfeit deposit.]

[Bahasa Malaysia Translation Of Headnotes]

- f* Plaintiff telah memasukkan satu perjanjian dengan defendan pada 11 Oktober 1989 untuk membeli sebidang tanah dari defendan pada harga RM550,000. Menurut perjanjian tersebut, plaintiff telah membayar wang muka sebanyak RM50,000 kepada defendan. Kemudiannya, pada 10 Januari 1990, defendan telah memberikan satu notis kepada plaintiff mengenai keinginannya untuk menamatkan perjanjian tersebut dan menawarkan pembayaran balik wang muka apabila
- g* perjanjian tersebut dianggap batal dan tak sah. Ia mengatakan bahawa plaintiff telah gagal untuk menyelesaikan pembelian tanah tersebut dalam masa tiga bulan sebagaimana yang telah diperuntukkan dibawah perjanjian tersebut. Plaintiff menolak 'penamatan satu pihak' perjanjian tersebut dan memulakan tindakan untuk tuntutan pelaksanaan spesifik. Rayuan ini adalah satu rayuan terhadap
- h* keputusan Mahkamah Tinggi yang menolak tuntutan plaintiff dan membenarkan tuntutan balas defendan. Isu utama dihadapan Mahkamah Rayuan ini adalah samada penamatan perjanjian yang dibuat oleh defendan, dalam keadaan kes ini, sah dan efektif.
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Diputuskan:

Oleh Arifin Zakaria HMR

[1a] Klausa 3(a) perjanjian tersebut dengan jelasnya memperuntukkan bahawa jualbeli tanah tersebut hendaklah diselesaikan dalam masa 90 hari dari tarikh perjanjian tersebut, iaitu, pada atau sebelum 9 Januari 1990. Defendan dengan itu telah bertindak sejajar dengan terma-terma perjanjian tersebut pada kala ia menamatkan perjanjian itu apabila plaintif gagal untuk menyelesaikan pembelian tanah tersebut pada 9 Januari 1990.

[1b] Meskipun kl. 3(a) perjanjian tersebut juga memperuntukkan bahawa “penjual akan membenarkan perlanjutan masa selanjutnya selama 30 hari kepada pembeli berhubung dengan tarikh penyelesaian tetapi pada pembayaran faedah pada baki belum bayar harga pembelian tersebut”, ianya tidak secara automatik memberikan plaintif 30 hari perlanjutan masa apabila hadmasa awal 90 hari tersebut tamat. Plaintiff hendaklah memberi notis kepada defendan mengenai keinginannya untuk mendapat 30 hari perlanjutan masa tersebut. Pemberian notis adalah satu pra-syarat yang tersirat untuk kl. 3(a) perjanjian tersebut berkuatkuasa.

[2] Tawaran defendan untuk membayar balik wang muka sebanyak RM50,000 yang dibayar oleh plaintif adalah tertakluk kepada kedua-dua pihak mencapai penyelesaian secara baik dan plaintif bersetuju untuk menganggap perjanjian tersebut batal dan tak sah. Oleh kerana plaintif tidak mahu menganggap perjanjian tersebut batal dan tak sah, dan telah memulakan tindakan untuk pelaksanaan spesifik ini, tawaran defendan tidak lagi wujud. Dalam keadaan ini, defendan berhak untuk melucuthak wang muka tersebut.

Rayuan plaintif ditolak; penamatan perjanjian sah; defendan berhak melucuthak wang muka.]

Case(s) referred to:

Jeow Fong Mei v. Chong Mee Yoke [1996] 2 CLJ 23 CA (**dist**)

SA Maritime Et Commercials of Geneva v. Anglo-Iranian Oil Co Ltd [1954] 1 WLR 462 (**refd**)

Other source(s) referred to:

Chitty on Contracts, vol 1, General Principles, 27th edn, para 12.040

For the appellant/plaintiff - Wong Kim Fatt (Khor Loke Yew & Leong Yin Yee); M/s Christina Chia Ng & Partners

For the respondent/defendant - Karpal Singh (Ram Singh Deo); M/s Karpal Singh & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S7-22-166-1990]

Reported by Gan Peng Chiang

*a***JUDGMENT****Arifin Zakaria JCA:****Background facts.***b*

This is an appeal by the plaintiff in the court below against the decision of the learned trial judge in dismissing the plaintiffs claim and in allowing the defendant's counterclaim. For convenient the parties will be referred to as "plaintiff" and "defendant" respectively.

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The facts leading to this claim may briefly be stated as follows. The defendant is the registered owner of land known as Lot. No. 8761, CT 25148, Mukim Kajang ("the said land"). By agreement dated 11 October 1989 ("the agreement") the defendant agreed to sell and the plaintiff agreed to purchase the said land at the agreed price of RM550,000 and on such other terms and conditions as contained in the agreement. It is not in dispute that a deposit of RM50,000 was paid by the plaintiff to the defendant on or before the execution of the agreement. Thereafter no further payment was made by the plaintiff.

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Vide letter dated 10 January 1990 the defendant sought to terminate the agreement with immediate effect. The said letter shorn of the formalities reads as follows:

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Sale and Purchase Agreement in respect of that piece of land held under CT 25148 Lot No. 8761 Mukim of Kajang

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We refer to the Sale and Purchase Agreement entered into between ourselves as vendor and yourselves as purchaser dated 11 October 1989. We give you notice that we are hereby terminating the said Sale and Purchase Agreement with immediate effect.

To this effect we propose to refund all deposit paid by yourselves to us and thereafter the Sale and Purchase Agreement is to be treated as null and void.

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Through its solicitors Lee & Lee the plaintiff informed the defendant that it could not agree or accept the unilateral termination of the sale. This is found in the plaintiffs solicitors' letter dated 12 January 1990 the material part of which reads as follows:

Re: Sale and Purchase of land held under C.T. 25148, Lot No. 8761, Mukim of Kajang

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We refer to your clients' letter dated 10 January, 1990 addressed directly to our clients, they purportedly terminated the Sale and Purchase Agreement.

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We are instructed to inform you that our clients do not agree or accept the unilateral termination of the sale by your clients and that they require specific performance. If the sale is not concluded in accordance with the Sale & Purchase Agreement dated 11 October 1989 our clients may have no alternative but to seek redress in a court of law and shall claim for specific performance and all costs, expenses and consequential damages flowing thereon. It will be deeply appreciated if you will kindly use your good office to assist in the successful completion of this sale.

The issues.

The first issue raised before us is whether the purported termination of the agreement by the defendant was legally valid and effective in the circumstances of the case. This in our view would turn on the construction and effect to be given to the cl. 3.(a), which stipulates as follows:

3(a) Completion of the sale and purchase hereunder of the said property shall take place within a period of Ninety (90) days from the date of this Agreement (hereinafter referred to as "the Completion Date"). Provided Always and it is hereby agreed by and between the parties hereto that the Vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the Completion Date but upon payment of interest on the outstanding balance of the purchase price at the rate of eight point five per centum (8.5%) per annum calculated on a daily basis during the period of extension.

The said cl. clearly provides that the Completion Date of the sale and purchase of the said property is within a period of 90 days from the date of the agreement. It is common ground that the Completion Date falls on 9 January 1990 ie, one day prior to the termination letter issued by the defendant. Therefore, it would appear that the defendant had acted within the terms of the cl. 3.(a) in issuing the termination letter on 10 January 1990 since the plaintiff failed to duly complete the sale and purchase of the said property at the expiry of the 90-day period.

The learned counsel for the plaintiff conceded that the completion date falls on 9 January 1990, however, he contended that according to the cl. 3.(a) the plaintiff is entitled to an extension of a further 30 days from 9 January 1990. He placed much emphasis on the stipulation that, "... the vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the Completion Date" subject to the plaintiff paying interest on the outstanding balance of the purchase price at the rate of 8.5% per annum calculated on a daily basis. It is contended that this provision gives the plaintiff the automatic right of extension of the Completion Date subject only to payment of interest as aforesaid. In support of his contention the learned counsel cited the case of *Jeow Fong Mei (P) v. Chong Mee Yoke (P)* [1996] 2 CLJ 23. To properly

- a* appreciate the premise upon which the decision was arrived at by the court in that case it is necessary in our view to consider the factual matrix in that case. In that case under cl. 4 of the sale and purchase agreement, the balance of the” purchase price was to be paid within three months of receipt of notification by the vendor’s solicitor’s to the purchaser’s solicitors that the second consent
- b* has been obtained, failing which the vendor shall grant the purchaser an extension of two months to settle the outstanding balance of the purchase price. The defendant was notified by the appropriate authority of the approval for transfer of the said premises on 12 July 1993. The defendant solicitors notified the purchaser’s solicitors that the dateline for the payment of purchase price
- c* would be 12 October 1993. The letter was received by the purchaser’s solicitors on 14 July 1993. The defendant purported to terminate the agreement by letter dated 13 December 1993. The learned Judicial Commissioner held that the extended date of completion expired on 12 December 1993. This court in that case held that the final date the purchaser was required to pay the balance of the purchase price was 13 December 1993 not 12 December 1993, hence the
- d* termination letter was one day too early.

- The learned counsel for the defendant contended that in the said case the issue of whether the extension of two months was mandatory under cl. 4 of the agreement was never canvassed before the court and as such the decision of
- e* the court did not turn on that issue. On reading the judgment of the court we fully agree with the submission of learned counsel for the defendant that the court did not address that issue in the said case. This is supported by what was said by Abdul Malek bin Hj. Ahmad JCA at p. 28:

- f* By cl. 4 and 7 of the agreement, it is clear that the plaintiff had three plus two calendar months from the date of receipt of the notification to make payment of the balance of the purchase price to the defendant failing which the agreement is considered determined with no further legal effect and a sum equivalent to ten per cent of the purchase price shall be forfeited as liquidated damages and any sum in excess thereof paid by the purchaser to the vendor shall be refunded to the purchaser free from interest.

- g* It is the computation of time of the five calendar months that is causing the problem. The contention of learned counsel for the plaintiff is that since the receipt of the letter was on 14 July 1993, the time for payment expires on 14 December 1993, and the plaintiff could still make payment on that date. The purported termination agreement by the defendant’s letter dated 13
- h* December 1993, was therefore, in his view, premature.

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Further down at p. 762 he said:

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Since we found that the extension would only commence on 14 October 1993, and end on 13 December 1993, the defendant's termination letter dated 13, December 1993 was certainly one day too early as the plaintiff could still pay up to midnight on that date.

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The issue before us is whether cl. 3.(a) of the agreement on its proper construction gives the plaintiff an automatic right to a further period of 30 days upon expiry of the 90-day period. The relevant part of cl. 3(a) stipulates that:

... the Vendor shall grant to the Purchaser an extension of a further thirty (30)days in respect of the Completion Date but upon payment of interest on the outstanding balance of the purchase price ...

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... calculated on a daily basis during the period of extension ...

The learned counsel for the plaintiff contended that because of the words "shall grant" in the said cl. 3.(a) it is mandatory for the defendant to grant the said extension without the plaintiff having to apply or indicate its interest in having the period extended. The learned counsel for the defendant on the other hand contended that the grant of an extension is not automatic. He, however, conceded that by the said cl. the defendant is no doubt obliged to grant the extension but it is implied in the said cl. that as a necessary precondition the plaintiff needs to notify the defendant of its desire to have the period so extended. In other words the plaintiff is not automatically entitled to the extended period of 30 days.

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The issue before us is what is the proper construction that ought to be given to cl. 3.(a). The judicial approach to the construction of contractual terms is well summarised in para. 12.040 of *Chitty on Contracts*, vol. I, General Principles, 27th edn. which reads as follows:

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Intention of the parties. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. This is to say, the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made.

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In *S.A. Maritime Et. Commercials of Geneva v. Anglo -Iranian Oil Co. Ltd.* [1954] 1 WLR 462, a case concerning the interpretation of a charterparty agreement Romer LJ at p. 496 observed as follows:

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- a* ... I think if one takes cl. 38 by itself one could legitimately construe it either in the way contended for by the charterers or in the way relied on by the shipowners without doing undue violence to the language used. But it is not permissible to construe one clause in isolation from the other.
- b* Reverting to the present case we agree that the words “shall grant” appearing in cl. 3.(a) taken by themselves would mean that the defendant is under obligation to grant the extension to the plaintiff without the plaintiff having to apply for the extension. However, as stated above word or words in an agreement ought not to be construed in isolation, they need to be construed within the context of the agreement as a whole. Looking at cl. 3.(a) it is clear
- c* that the plaintiff is required to complete the purchase of said property within 90 days of the date of the agreement. This 90-day period, however, is subject to a further extension of 30 days upon payment of interest by the plaintiff on the balance sum at the stipulated rate. The question that arises is whether this interest is payable only if the plaintiff decides to proceed with the purchase or
- d* is payable in any case whether the plaintiff decides to proceed with the purchase or otherwise. We think the answer to this question is crucial to the issue before us ie, whether the plaintiff needs to give notice of its intention to have the Completion Date extended or otherwise. What cl. 3.(a) provides is that the purchaser is entitled to an extension of the Completion Date “upon payment of interest on the outstanding balance ...”. In our view the plain meaning of
- e* this would be that the purchaser will have to pay interest on the balance sum if he wants to have the Completion Date extended. Thus, by necessary implication, in order to bring this provision into effect it is incumbent upon the purchaser to notify the vendor of his intention to have the Completion Date extended.
- f* In the present case not only that the plaintiff failed to notify the defendant of its desire to have the Completion Date extended but in its solicitors’ letter of 10 January 1990 the plaintiff contended that it is not obliged to pay the interest on the balance sum since it has fulfilled all its obligations under cl. 3.(c).
- g* However, from the undisputed facts before the court we find that on the Completion Date neither the balance of the purchase price had been paid nor the necessary undertaking had been furnished to the stakeholders. Further, as we have said earlier, the plaintiff also failed to notify the defendant of its intention to have the Completion Date extended. Therefore, based on those facts
- h* we are of the view that the defendant was clearly acting within its right in terminating the agreement *vide* its letter of 10 January 1990.
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The Counter Claim By The Defendant For The Deposit

In the 6th ground of appeal the plaintiff contends that:

6. In respect of the counterclaim, the learned judge erred in law and fact in ordering payment to the Respondent the sum of RM50,000. 00 with interest when the Respondent never made such a claim. The Respondent only sought in the counterclaim that the sum of RM50,000.00 be forfeited.

Looking at the order of court dated 3 January 1999 it is clear that the learned judge had allowed the counterclaim by the defendant for the sum of RM50,000 and further ordered that an interest of 8% p.a. be paid on the said sum to be calculated from 9 January 1990 until full payment. From the facts before the court it is not in dispute that the said sum of RM50,000 was paid by the plaintiff to the defendant on or before the execution of agreement pursuant to cl. 2.(a). This is further confirmed by the defendant's letter of 10 January 1990 in which the defendant proposed that all the deposits paid by the plaintiff be refunded to the plaintiff. Therefore, we agree with the contention of the plaintiff that it is erroneous on the part of the court to allow the counterclaim by the defendant on those terms. In our view the correct order would have been that the sum of RM50,000 being the deposit paid under the agreement be forfeited to the plaintiff pursuant to cl. 9. Since the said deposit had already been paid to the defendant therefore the order by the learned judge for payment of interest by the plaintiff on the said sum also ought to be set aside.

There is one other issue raised by the plaintiffs counsel with regard to the forfeiture of the deposit. He contended that since the defendant in its letter of 10 January 1990 offered to refund all deposits to the plaintiff therefore rightly no order of forfeiture of the deposit should, in the circumstances, be made against the plaintiff. Learned counsel for the defendant countered by saying that the offer for refund was made with a view of the parties reaching an amicable settlement on the matter, however, since the plaintiff had elected to commence legal action against the defendant the offer could not be taken against the defendant. Reading the relevant part of the letter we agree with the contention of the learned counsel for the defendant that the offer to refund the deposit made by the defendant is subject to the plaintiff agreeing to treat the agreement as null and void. Since the plaintiff refused to treat the agreement as null and void, therefore, naturally the offer no longer stands. In the circumstances, we think the defendant is entitled to have the deposit forfeited in accordance with cl. 9.

a **Conclusion**

For the above reasons we dismissed the plaintiff's appeal herein with costs, however, the order of the court directing the plaintiff to pay to the defendant the sum of RM50,000.00 together with interest of 8% p.a. thereon is hereby set aside and we substitute, therefore, with an order that the sum of RM50,000.00, being the deposit paid to the defendant, be forfeited to the defendant.

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The decision in this case was delivered on 7 February 2003 and in the meantime one member of the panel, Mohd. Saari bin Yusoff JCA had since retired. The other member of the panel, Mohd. Noor bin Ahmad JCA has read this judgment in draft and has expressed his agreement with the same.

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